PENGURUSAN KUMPULAN MARA SDN. BHD.

v.

RMR AUTOMOBILES SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[CIVIL SUIT NO. C23-240-86]
3 JANUARY 1989

CIVIL PROCEDURE: *Summary judgment - Contract in writing - Alteration of date of agreement without the consent/knowledge of the other party - Whether triable issue.*

CONTRACT: *Discrepancy in amounts claimed - No demand - Discrepancy in dates between principal agreement and guarantee - Whether triable issues.*

By an agreement pleaded by the plaintiff as being dated 7 November 1985 between the plaintiff and the 1st defendant ("the agreement") it was agreed that the plaintiff would sell and the 1st defendant would purchase for the sum of RM125,000 the entire shares belonging to the plaintiff in Prestige Automobiles Sdn. Bhd. ("the company"). By Clause 2(a) of the agreement, the 1st defendant should have paid to the plaintiff a sum of RM50,000. The plaintiff averred that this sum was never paid.

At the same time, the plaintiff claimed a sum RM175,400 owed to the plaintiff by the company payable by the 1st defendant as part of the bargain for the sale and purchase of the shares. The plaintiff therefore claimed specific performance of the agreement, the said sum of RM175,400, together with other sums and other reliefs.

In its defence the 1st defendant stated that the agreement was entered into in 1984 and that the plaintiff had altered the date of the agreement without the 1st defendant's consent or agreement.

The plaintiff submitted that the date of the agreement was amended for stamping purposes and that this does not invalidate the terms of the same. Further the plaintiff stated that the said alteration was made with the consent of the 1st defendant.

The plaintiff had sued the 2nd - 4th defendants under a guarantee executed by them. In the statement of claim the plaintiff claimed from them a sum of RM300,400. The guarantee contained the words "upon demand on us". The guarantee provided that the sums guaranteed by the guarantors shall amount to RM250,000. There was no demand made on the guarantors.

Held:

[1] The statement of claim states that the date of the agreement as 7 November 1985 - the same has not been amended to 7 November 1984. There is no documentary evidence to show that the 1st defendant had agreed to the alteration of the date of agreement. This matter should therefore be decided at the trial.

[2] The discrepancy in the dates of the agreement and the guarantee raises another triable issue.

[3] The plaintiff has not shown that they have complied with the demand clause. The plaintiff is not entitled to make any claims against the guarantors.

[4] The difference between the amounts claimed by the guarantors and the amounts stated as payable by them under the guarantee is another triable issue.

[Application for summary judgment dismissed.]

Cases referred to:
Mok Hin Wah v. United Malayan Banking Corporation Berhad [1987] CLJ (Rep) 219
Koh Siak Poh v. Perkayuan O.K.S. Sdn. Bhd. [1985] CLJ (Rep) 506

Legislation referred to:
Rules of the High Court 1980, O. 14

For the defendants - S. Azariah; M/s. Yusoff Shamsuddin & Partners
For the plaintiff - S.K. Oh; M/s. Shariff & Som

JUDGMENT

Zakaria Yatim J:

This is an application by the plaintiff for an order that leave be given to enter final judgment against the four defendants and costs under O. 14 of the Rules of the High Court 1980 as prayed in the statement of claim. In the statement of claim, the plaintiff averred that by an agreement dated 7 November 1985 between the plaintiff and the first defendant, it was agreed that the plaintiffs would sell and the defendants would buy for the sum of RM125,000, the entire shares belonging to the plaintiff in the Prestige Automobiles Sdn. Bhd. The plaintiff also averred that under Clause 2(a) of the said agreement a sum of RM50,000 should have been paid by the first defendant upon the execution of the said agreement, as part payment of the purchase price of the said shares.

According to the plaintiff the first defendant has failed to pay this sum. It was further averred that Prestige Automobiles Sdn. Bhd. was indebted to the plaintiff in the sum of RM175,400 for goods sold and delivered by the plaintiff to Prestige Automobiles Sdn. Bhd. According to the plaintiff the first defendant should have paid the sum of RM175,400 to the plaintiff and the said sum should be considered as part of a bargain of sale of the plaintiff's shares in Prestige Automobiles Sdn. Bhd. to the first defendant. The statement of claim contains the following prayers:

(i) Specific performance of the said agreement;

(ii) All necessary and consequential accounts, directions and inquires from the date the defendants occupied the premises;

(iii) Damages for breach of contract in lieu of or in addition to specific performances;

(iv) A declaration that they are entitled to a lien on the said shares certificate for the unpaid balance of the purchase money payable under the said agreement;

(v) The said sum of RM175,400;

(vi) Alternatively and/or in addition against the 2nd, 3rd, and 4th defendants for the said sum of RM125,000;

(vii) Against the 2nd, 3rd, and 4th defendants the sum of RM175,400;

(viii) Interest on the said sum of RM300,000 at the rate of 8% per annum from the date of this summons to the date of full settlement;

(ix) A declaration that the plaintiffs be absolved from future performance of the obligations under the said agreement;

(x) Damages for breach of contract, and

(xi) Further or other remedies the Honourable Court may deem fit.

In the statement of defence, the defendants averred that the first defendant entered into an agreement with the plaintiff in 1984. The first defendant alleged that the plaintiff had altered the date of the agreement from 1984 to 7 November 1985 without the defendants' consent or knowledge.

Miss S.K. Oh, Counsel for the plaintiff submitted that the date of the agreement was 7 November 1984 but it was amended to 7 November 1985 for stamping purposes. According to her, the agreement does not invalidate the terms of the contract. The plaintiff also stated in their affidavit that the alteration was made with the consent of the defendants.

It is clear from the statement of claim that the plaintiff's claim is based on an agreement dated 7 November 1985. The statement of claim has not been amended to say that the agreement was dated 7 November 1984. There is no documentary evidence to show that the defendants had consented to the amendment of the date.The agreement itself does not show that the first defendant had consented to the alteration of the date. The plaintiff's suggestion that the first defendant had consented to the amendment of the date must be based on an oral consent. Assuming the plaintiff's suggestion is right, this is a matter to be decided at the trial. See *Koh Siak Poh v. Perkayuan O.K.S. Sdn. Bhd.* [1985] CLJ (Rep) 506.

Assuming that the agreement is dated 7 November 1985 the guarantee and indemnity agreement is dated 1984, the discrepancy in the dates raises a triable issue as to whether there is a past consideration or not.

Miss Azariah, Counsel for the defendants, submitted that there were no letters of demand given to her clients before the proceeding was instituted. There is, however, no averment either in the statement of defence or in the affidavits filed by the defendants. Miss Oh's submission appears to confirm that no letters of demand were given to the defendants. In my opinion letters of demand should have been sent by the plaintiff or their solicitors to the second, third and fourth defendants. Clause 2(d) of the letter of guarantee states:

> that all sums of monies not recovered or recoverable from us on the basis of a guarantee whether by reason of any legal limitation disability or incapacity on or of the purchaser or any other fact and circumstance and whether known to you or not shall nevertheless be recoverable from us as principal debtors in respect thereof of and shall be repaid by us upon demand on us made by yourselves, (Emphasis added).

This is clearly a demand clause. The plaintiff, as creditors, must prove a real demand by sending actual notice of demand to the guarantors. See *Mok Hin Wah v. United Malayan Banking Corporation Berhad* [1987] CLJ (Rep) 219 at 220. In the absence of any evidence that a real demand had been made to the guarantors before the plaintiff instituted the proceedings, the plaintiff is not entitled to make any claim against the guarantors namely the second, third and fourth defendants.

Finally, I shall refer to the prayers in the statement of claim. It will be noted that in prayer (v) of the statement of claim, it is not clear against whom the sum of RM125,400 is claimed. In prayer (vi) and prayer (vii) the plaintiff's claim against the guarantors namely, the second, third and fourth defendants is for a total sum of RM300,400. Assuming that the guarantee agreement is a valid agreement, the guarantors agreed to pay the plaintiff the sum stated in Clause 2(b) and Clause 3 of the principal agreement. The sum stated in Clause 2(b) is RM75,000 and the sum stated in Clause 3(a) is RM175,400 and the total amount is RM250,000. There is, therefore, a difference between the amount claimed and the amount stipulated in the guarantee agreement. In their statement of defence, the second, third and fourth defendants

stated that the guarantee agreement is not enforceable against them. In my view the question whether the second, third and fourth defendants are liable to pay the plaintiff under the guarantee agreement is a matter to be decided at the trial. If they are liable to pay the plaintiff, the question of the amount they have to pay is also a triable issue.

For the reasons stated above this case should be decided at the trial. I therefore dismiss the application with costs.

Also found at [1989] 2 CLJ 1255